merit whatsoever. The case for Mulpha was amply proven by documents exhibited in its various affidavits, all of which showed delivery of the goods to Polycool and acknowledgment of receipt thereof by someone for and on behalf of Polycool. On the other hand, what Polycool and the third defendant sought to do was to throw a red herring into the case by raising the amount of RM40,000 which had been paid. However, a perusal of the accounts showed that this had been properly accounted for by Mulpha and in fact Polycool had been given credit for this amount and what was claimed was only the balance.

On 19 August 1993, Encik James Ong appeared for the defendants and asked for leave to appeal to the Supreme Court. He submitted that the appeal would relate to questions of fact and questions of law of public interest which had not yet been decided by the Supreme Court, i.e. whether in an application under O. 14 of the Rules of the High Court 1980, the plaintiff and the defendants by their affidavits could improve on their respective pleadings. Apparently when the case was set down for, decision on 2 August 1993 Encik James Ong had rushed off the submission in reply of Polycool and the third defendant to the Court but this had not been received by me when I delivered my decision. Encik James Ong said that the period of the guarantee was from 1985 to 1988 whereas the claim was in respect of goods supplied earlier. Furthermore the statement of claim related to that guarantee only whereas it was only in the affidavit filed subsequently that Mulpha also exhibited earlier guarantees by the third defendant which were identical to that covering the period from 1 June 1985 to 31 May 1988. Encik James Ong submitted further that the claim of fraud committed by Mulpha only came to light when Mulpha filed its Order 14 application. According to him these were questions of law which needed to be decided by the Supreme Court and he requested for leave to appeal as the amount involved was below RM100,000. In these circumstances, I granted Polycool and the third defendant leave to appeal to the Supreme Court even though, the points raised in the reply on their behalf were not before me when I gave my decision.

NOEL KENNETH DAVIDSON

v.

FIRM CORPORATION SDN. BHD.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CIVIL APPEAL NO. T(12)-5 OF 1993]
21 FEBRUARY 1994

TORT: Claim for damages for conversion - Appellant causing the replacement of the authorised signatories of the respondent with the bank - Appellant subsequently withdrawing moneys from the account of the respondent - Moneys were used to pay the debts of the respondent - Whether there was conversion.

PRACTICE & PROCEDURE: Appellant counter-claiming for moneys disbursed on behalf of respondent - Moneys disbursed from the account of HFR of which appellant was the receiver - Appellant counter-claiming in his personal capacity - Whether appellant entitled to judgment on his counter-claim.

EVIDENCE: Evidence given on behalf of appellant that moneys withdrawn from account of respondent was used to pay the debts of the respondent - Whether it was "proved" that the moneys were so used - Documentary evidence of payment destroyed - Whether oral evidence of contents of documents admissible - Application of ss. 65(1)(c) & 63(e) of the Evidence Act 1950 - Whether the evidence adduced was sufficient as prima facie proof that the moneys had in fact been paid for the purposes stated.

The appellant, a partner of a firm of accountants, was appointed as receiver of HFR. HFR was sharing the same office premises as the respondent. During the course of the receivership the appellant caused to be issued, from the account of HFR, sums of money for and on behalf of the respondents including the wages for the respondents' workers, payments for the upkeep of the respondents' machinery, rental due and owing by the respondent and payments to an estate agent for services rendered to the respondent. The appellant subsequently replaced the authorised signatories of the bank account of the respondent with the appellant's nominees and withdrew moneys from the said account which sums were paid to HFR to reimburse the moneys drawn from the account of HFR.

The respondent claimed, against the appellant damages for conversion, and against the bank

for having allowed the said amount to be withdrawn without the authority of the respondent. The appellant counter-claimed for the difference between the amount disbursed from the account of HFR and the amount withdrawn from the account of the respondent. The trial Judge gave judgment for the respondent against both the appellant and the bank and dismissed the appellant's counter-claim. The appellant appealed.

Held:

[1] The oral evidence of Kow, Lim and Pang regarding the moneys paid to the respondents' estate manager, their oral accounts of the check rolls, the evidence that the workers had demonstrated for their pay in December 1986 and that there were no demonstrations after the appellants begun giving moneys to the estate manager, all go to establish on a balance of probabilities that the moneys had gone to pay for the wages of the workers of the respondent.

[2] In the light of ss. 65(1)(c) & 63(e) of the Evidence Act 1950, which provide that oral evidence of the contents of a document can be given when the original has been destroyed or lost, there was sufficient *prima facie* evidence to establish that the payments were made for the purposes stated. As the respondent had failed to adduce any evidence in rebuttal, it could be safely concluded that, on a balance of probabilities, the moneys had been disbursed for the stated purposes.

[3] The appellant cannot be regarded as having committed conversion when the appellant caused the money standing to the credit of the respondent in the bank account to be depleted by issuing cheques to third parties who drew on the account. The property in the moneys passed to the bank when they were paid into the account of the respondent with the bank and the result was that the amount of moneys became a debt owing by the bank to the respondent.

[4] Therefore, the right or title to that specific moneys was no longer that of the respondent and that being the case, the respondent cannot succeed in a claim for conversion of the moneys against the appellant.

[5] An action for conversion cannot lie in respect of money and "money" includes money standing to the credit of a person in a current account.

[6] Even if it can be said that the moneys were converted, it was used to pay the debts of the respondent and the appellant must be allowed the advantage of such payments.

[7] The appellant was not entitled to judgment on the counter-claim. The appellant was sued in his personal capacity. The money he counter-claimed came from the account of HFR, of which he was the receiver, but he did not counter-claim for the said sum on behalf of HFR. The appellant had no right in his personal capacity to the money which he counter-claimed.

[Appeal partially allowed. Respondents' action against appellant dismissed with 80% costs. Dismissal of appellant's counter-claim upheld].

Cases referred to:

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Goverment of State of Penang & Anor. v. B.H. Oon & Ors. [1971] 2 MLJ 232 PC, at p.238 ***(refd)***

Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 137 ***(dist)***

Lacave & Co. v. Credit Lyonnais [1897] 1 QB 148 ***(refd)***

United Australia Ltd. v. Barclays Bank Ltd. [1940] 4 All ER 20 ***(refd)***

Si Kiong Industries Sdn. Bhd. v. Liau Shu Chau [1993] 1 AMR 9:779; [1993] 4 CLJ 468 ***(refd)***

A.L. Underwood, Ltd. v. Bank of Liverpool and Martins [1924] 1 K.B. 775, at p.794 ***(refd)***

Re Collings [1933] Ch. 920 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 3, 63(e), 65(1)(c)

Other sources referred to:

Clerk & Lindsell on Torts, 16th Edn., paras 22-36, para 22-37

Halsbury's Laws of England, 4th Edn., Vol. 45, para 1493

Phipson on Evidence, 14th Edn., paras 4-10, 4-38

For the appellant-Alex Decena; M/s. Jayasuriya Kah & Co.

For the respondent-Cecil Robertson; M/s. Joseph Lee & Co.

JUDGMENT

Ian H.C. Chin J:

This appeal was filed by Noel Kenneth Davidson ("the Appellant") on 14 December 1993 and heard on 2 February 1994 whence I adjourned for judgment. Firm Corporation Sdn Bhd ("the Respondent") claims against the appellant damages for conversion or alternatively for the sum of RM71,120.20 had and received. The respondent

had, also in the same action, claimed against the Standard Chartered Bank ("the Bank") for the said sum for having wrongfully and without the respondent's authority allowed the said amount to be drawn from the account of the respondent.The Sessions Judge, after a trial, delivered her judgment on 11 December 1992 for the respondent against both the appellant and the Bank. The Bank failed to obtain leave to file an appeal out of time. This appeal therefore concerns only the appellant and the respondent. The facts of the case are these.

The respondent, a limited company, at the material time, had an account with the Bank ("the said account"). The authorised signatories for the said account of the respondent was, by a resolution made on 14 January 1982, to be that of Hiew Min Yong ("Hiew") alone or any two of three other persons. On 2 December 1986, the appellant, a partner of the firm of accountants called Ernst & Whinney ("the Accountants"), was appointed by the Bank to be the receiver of HFR. Staff of the Accountants then moved into the office of HFR which was shared by the respondent. The Accountants then on 15 December 1986 caused to be paid from the bank account of HFR a sum of RM1,000 for the purchase of tyres to be fitted to the machinery of the respondent and the Accountants on 23 December 1986 also caused to be paid from the account of HFR to one Tan Chang Kok ("the estate manager"), an estate manager of the respondent, a sum of RM22,855.03 to pay for arrears of wages of the workers of the respondent. Following that, the Accountants, without the agreement of the respondent, wrote to the Bank on 8 January 1987 and replaced the authorised signatories of the respondent with that of the nominees of the appellant for the operation of the said account. The nominees of the Accountants thereafter operated the said account and withdrew a sum of RM20,000 from the said account which was paid to HFR to disburse the moneys drawn from the account of HFR. Another RM50,962.54 was drawn from the said account during the period of 16 February 1987 to 30 March 1987 and these payments were allegedly as follows:

16 February 1987	-	December 1986 wages	RM27,375.70
16 February 1987	-	Rental	RM 700.00
2 March 1987	-	January 1987 wages	RM22,055.59
14 March 1987	-	Chong & Associates	RM 700.00
30 March 1987	-	Cocoa cess	RM 131.25
			RM50,962.54

It is disputed whether the moneys were disbursed as alleged and that is what this appeal is all about. Hiew, who had left Sabah in the middle of 1986, returned in early March 1987, and, after discovering the said withdrawals of moneys from the said account, on 14 October 1987 signed the letter issued by the respondent to the Bank asking for the names of the new signatories. The authority of the Accountants' signatories were thereafter removed at the instance of the appellant and that of the respondent restored. The present action was thereafter commenced.

The respondent's claim against the appellant is that:

> the [Appellant] have wrongfully converted the said amount to his own use and wrongfully deprived the [Respondent] Company of the same, whereby the [Respondent] Company has suffered loss and damage in the said sum of RM71,120.20. Alternatively, the said sum is payable to the [Respondent] Company by the [Appellant] as money [had and received] by him to the use of the [Respondent].

The appellant admitted causing the moneys to be withdrawn from the account of the respondent after his appointment as the receiver of HFR but said that he had "acted *bona fide* in the interest of the [Respondent] to avoid possible damage to or loss of assets of the [Respondent] as a result of either violence or abandonment of the [Respondent's] estate by the [Respondent's] employees". The appellant counterclaimed a sum of RM3,866.89 which is the balance of the sum of RM23,866.89 which was drawn from the account of HFR for the purposes of the respondent of which only a sum of RM20,000 was returned to it. The respondent replied and, apart from joining issues, said that the matters pleaded by the appellant "do not in law justify the [Appellant] in changing the signatories to the said account or in paying out the monies therein stated." As was stated earlier, the argument centred on whether there is evidence to support the appellant's contention that the moneys, set out, *supra*, were disbursed for the benefit of the respondent, that is to say, to pay the wages of the workers of the respondent, to pay for tyres to be fitted to the machinery of the respondent, to pay for the rental owing by the respondent and to pay for the services of an agent called Chong & Associates rendered to the respondent. The evidence in this regard had

to be stated in some detail and they are as follows.

One Kevin How Kow ("Kow"), an accountant, then working for the appellant gave evidence for the appellant. He testified that he assisted in the management of the affairs of HFR which was then under the receivership of the appellant. He also took over the management of the respondent under the mistaken assumption that the appellant was entitled to do so. At the relevant time the estate manager of the respondent came to see Kow, a Lim Ted Hing ("Lim") and a Pang Pak Lok ("Pang"), the latter two were also accountants working for the respondent, for the payment of the November wages that were due to the workers of the respondent's estate. The workers in fact demonstrated for their pay. The estate manager had said to them that there was danger to his life and to the estate as well. This resulted in Kow causing a sum of RM22,855.03 to be paid to the estate manager on 23 December 1986 from the account of HFR for the purpose of paying the workers. RM20,000 of this amount was repaid to HFR's account by a cheque issued on 23 January 1987 and drawn on the account of the respondent. Two other sums, respectively RM27,375.70 (paid on 16 February 1987) and RM22,055.59 (paid on 2 March 1987), were also paid to the estate manager for the purpose of paying the wages of the respondent's workers respectively for the month of December 1986 and January 1987. Kow, Lim and Pang were all, singularly or together, involved in the preparation or signing of the documents necessary to effect issuance of the said cheques to the estate manager. Lim had himself checked and signed the check-roll to satisfy himself that the wages were paid to the workers. He testified that the check-roll bore thumb-prints acknowledging the receipt of the wages. He testified that a fire had occurred in his office resulting in the destruction of the check-rolls which were returned by the estate manager to his office after payment of the wages were made. The estate manager could not be traced to give evidence and the check-rolls were, as a result of their destruction by fire, not able to be produced. Those, in brief, are the evidence relating to payment for the wages of the respondent's workers. As for the RM1,000 for tyres, it was paid to the respondent's assistant manager who signed a payment voucher. The rental of RM700 was paid to a Tan Kim Moi who also acknowledged receipt by signing a payment voucher and a payment voucher was also signed by someone on behalf of Chong & Associates in respect of the payment of the other RM700. As for the sum of RM131.25 for cocoa cess, the Lahad Datu District Council issued a receipt to the name of the respondent.

The other evidence in this case show that the estate manager had power to collect payment from Sabah Marketing Corporation Sdn. Bhd. in respect of the sale of cocoa beans by the respondent to the company. There was no more demonstration by the workers over the non-payment of wages. For the respondent, Hiew gave evidence. As regards the alleged payments he had this to say:

> I was not informed that wages for labourers had been paid. I was not informed that debts had been paid. No creditor of [Respondent] approached for payment of debts. I have more important matters to deal with not only [Respondent]. I had left all to Mrs. Yui as far as accounts are concerned.

The learned Sessions Judge in her judgment, with regard to this issue, has this to say:

> [Kow, Lim and Pang] said the Receiver trusted [the estate manager] and cash were paid to him. At the trial Pang believed there was a possibility that [the estate manager] would have pocketed the wages for himself if there was no staff from Ernst & Young to see the actual payment. There is clear evidence that no one from Ernst & Young did see the actual payment of the wages to the workers. Although vouchers were produced at the trial but not the checkrolls as it was alleged that there was a fire in August 1987 and they might be destroyed by the fire.
>
> [Pang] testified that the workers salaries were calculated on daily basis. There was roughly 50% of Indonesian workers and 50% of the Philippines workers who had no identity card. Therefore, there is no way that they could be traced to testify whether they had actually received the actual payment.
>
> Further, [the estate manager] who was responsible to pay the salaries to workers cannot be traced and no one could testify that actual salaries had been paid to the estate workers. In these circumstances benefit of doubt should be given to the plaintiffs company. Plaintiffs Counsel has cited the case of *Chong Khee Song v. Pang Ah Chee* [1984] 1 MLJ 137.
>
> Again the payment of RM1,000 for tyres and diesel was paid to the Assistant Estate Manger

> Mr. Phang Ah Hong who was not called as a witness and there is no evidence that he actually used the said payment for tyres and diesel. The same thing happens to the payment of rental of RM700 as no specific evidence that the rental was advanced to the landlord.
>
> Further, I accept the submissions made by the plaintiffs counsel that Exhibit 11 and 33 are not evidence that the RM700 was paid to Chong & Associates as there is no bill or receipt produced. It was held in *Chong Khee Sang v. Pang Ah Chee* that if a document is to be proved such proof must be given by the maker. The second defendant claimed that the payment concerned were made on the plaintiffs company's behalf as just debts due, by the plaintiffs company. However, no evidence was called and given by recipient of payment to wages of workers the rental of RM700 the payment of RM1,000 for purchasing tyres and diesel, the payment of RM700 to Chong & Associates, the visiting estate agent. The document produced is payment vouchers prepared by the second defendant. This in itself in the words of Shankar J. falls short of the proof that these payment were in fact for the purposes for which it is stated or that [Respondent] was liable to pay them.

Before I advert to the judgment which I just quoted, it is the opportune moment to examine the relevant law regarding "proof". The definition of "proved" is given in s. 3 of the Evidence Act 1950, which says:

> "proved": a fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists;

It is trite law that the standard of proof required in civil cases is generally expressed as proof on the balance of probabilities. In *Miller v. Minister of Pensions* [1947] 2 All ER 372, at p. 373-374, Denning J. said:

> If the evidence is such that the tribunal can say 'we think it more probable than not,' the burden is discharged, but if the probabilities are equal it is not.

The degree of probability will vary from case to case and depends on the subject-matter. See **Phipson on Evidence,** 14th Edn., at para. 4-38. In the present case, the appellant carries the evidential burden of proving the allegations that the payments were for the purposes as alleged but this question of burden, or onus, as it is also called, only becomes relevant if the evidence is so evenly balanced that there is no preponderance of probability. See *Government of State of Penang & Anor. v. B.H. Oon & Ors.* [1971] 2 MLJ 235 PC, at p. 238. This burden can be satisfied by any species of evidence sufficient to raise a *prima facie* case. See **Phipson**, at para 4-10. Oral evidence of the contents of a document can be given when the original has been destroyed or lost. See s. 65(1)(c) and s 63(e) of Evidence Act 1950. I will now revert to the judgment of the learned Sessions Judge.

It is obvious that she did not have s. 65(1)(c), read with s. 63(e), of the Evidence Act 1950, in mind with the result that she failed to take into consideration the evidence of Lim and Pang to the effect that they had seen and checked the check-rolls before they were destroyed by a fire. Just because the estate manager and the workers cannot be traced to give evidence to show that the moneys the estate manager received were actually paid to the workers, the learned Sessions Judge felt that she had to give "the benefit of doubt" to the respondent, meaning that the appellant had failed to prove the receipts of the money by the workers. She then referred to *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 137, a case cited by Counsel for the respondent, as supporting her conclusion. The relevant facts of that case are these. Counsel had agreed to the inclusion of certain receipts in an agreed bundle of documents and did not object to its admission when they were marked as evidence but Counsel had, nevertheless, when agreeing to the bundle of documents, stated that the he did not accept that payments alleged in the receipts are proven. No evidence was adduced that the moneys had been disbursed and the issuer of the receipts was not called to prove the payments. There was no evidence whatsoever that it was the plaintiff who had paid the moneys referred to in the receipts. The Court there held that the claim for special damages to which the receipts allegedly related was not proven. The situation of this case is entirely different. Lim and Pang, the persons who made the payments to the estate manager were called, and the estate manager's signatures on the payment vouchers signifying receipt of the payments for wages for the respondent's workers were also proven. Secondary evidence was also given of the existence of the check-roll showing payment of wages to the workers of the respondent. There was also the evidence of Hiew that

the workers or other creditors had not come calling to demand their wages or the debts which the appellant had settled. Apart from reciting the evidence, the learned Sessions Judge did not consider them at all. She should have asked herself whether the evidence I have just referred to is sufficient as *prima facie* proof that the moneys had in fact been paid for the purposes stated. Given the circumstances of this case, those were the best and only evidence available and which the appellant had adduced. She had totally misdirected herself on the evidence. The oral evidence of Kow, Lim and Pang regarding the moneys paid to the estate manager, their oral accounts of the check-rolls, the evidence that the workers had demonstrated for their pay in December 1986 and that there was none after the appellants begun giving moneys to the estate manager and that the workers had not come calling to demand their November 1986 to February 1987 wages, all go to establish on a balance of probabilities that the moneys had gone to pay for the wages of the workers of the respondent. Those are sufficient evidence to *prima facie* establish the alleged payments to which the respondent had to reply and there was no evidence in rebuttal. The burden, if that is relevant, had shifted on the respondent to prove that the workers did not in fact receive their wages. This they can very simply do by showing that they had to pay the workers their wages again for the months which the appellant had alleged they had made payment. Such evidence was not forthcoming from the respondent. From this, one can safely conclude that, on a balance of probabilities, the moneys had gone towards payment of the wages of the workers of the respondent. The same can be said for the payment of the rental of RM700 and the agency fee of RM700. The cocoa cess payment which is evidenced by a receipt of the said local authority is not really challenged and we should not waste such time on such a miserly sum of RM131.25. The judgment of the learned Session Judge awarding the respondent the sum of RM70,962.25 is therefore set aside. There are two attending issues that had to be decided as they have a bearing on the costs - (1) whether as a result of the setting aside of the award of damages it means that the respondent had failed in its action against the appellant for conversion and (2) whether it follows that the appellant is entitled to succeed on his counterclaim?

As for the second question, I am of the opinion that the appellant is not entitled to judgment. He was sued in his personal capacity. The money he counter-claimed came from the account of HFR of which he was the receiver but he did not on behalf of HFR counterclaim for the sum. He, since 30 June 1990, ceased to be the receiver of HFR. He has no right in his personal capacity to the money which he in his personal capacity counter-claimed. Therefore, there cannot be judgment for the appellant for his counter-claim.

As regards the question whether there was conversion, the law relating thereto have now to be examined. It is said in **Clerk & Lindsell on Torts,** 16th Edn., at para. 22-36, that at common law an action would lie for the taking or conversion of any corporeal personal property, including papers and title-deeds, other than money regarded as currency. The same author at para 22-37 adds:

> ... Of course if a man simply receives a sum to be repaid on request the property in it passes, and his only liability is for the debt: but if the understanding was that he should return or hand over the specific coins entrusted to him and he converted them to his own use an action for conversion would lie, and the same action lay for the conversion of a lost bank note ...

When a cheque is involved, the conversion is not of the money derived from the cashing of the cheques or the amount credited to an account, but that of the cheque itself; the damages arising therefrom is the value of the cheque. See *Lacave & Co. v. Credit Lyonnais* [1897] 1 QB 148: *United Australia Ltd. v. Barclays Bank,* Ltd [1940] 4 All ER 20, at p.33. I had also the occasion to advert to what is conversion in *Si Khiong Industries Sdn Bhd v Liau Shu Chau* [1993] 1 AMR 9:779; [1993] 4 CLJ 468 and I cited with approval a passage from **Halsbury's Laws of England,** 4th Edn, Vol. 45, para 1493, where it is said that a plaintiff cannot succeed in an action for conversion unless he had, when the unlawful act was committed, the possession, or a right to the immediate possession, of the chattels unlawfully dealt with. I was also in that case of the conclusion that there must be a demand for the return of the chattel before an action for conversion can succeed. Could the respondent then succeed in its claim for conversion?

A little more of the statement of claim has to be stated. It is alleged that the appellant had no authority to draw any cheque, that the appellant had presented cheques to the value of RM71,120.20 drawn on the respondent's account and, as a result thereof, the appellant had "wrongfully converted the said amount to his own use and wrongfully deprived the [Respondent] of the same". The "demand" of the respondent was made through its lawyer's letter dated 20 November 1987 and couched in the following terms:

> We have now been informed that you have wrongfully allowed the Receiver of HFR to withdraw the sum of RM70,962.25 from the account of our client Company. We are instructed to ask you to repay the said sum to our client Company. You must also apologise to them for wrongfully changing the signatories and for allowing unauthorised withdrawals.
>
> Take notice that if the said sum is not paid, and the apology tendered, to our client within 23 hours from the service of this letter, action will be commenced against your bank.

I am of the opinion that the appellant cannot be regarded as having committed conversion when the appellant caused the money standing to the credit of the respondent in the bank account with the Bank to be depleted by issuing cheques to third parties who, thus, drew on the account. In the first place the property in the moneys passed to the Bank when they were paid into the account of the respondent with the Bank and the result was that the amount of moneys became a debt owing by the Bank to the respondent. See **Clerk & Lindsell on Torts,** 16th Edn., at para. 22-37, *supra*. Therefore, the right or title to that specific moneys was no longer that of the respondent and that being the case, the respondent cannot succeed in a claim for conversion of the moneys against the appellant. See *Si Khiong Industries Sdn Bhd v Liau Shu Chau* [1993] 1 AMR 9:779; [1993] 4 CLJ 468 and **Halsbury's Laws of England,** 4th Edn, Vol. 45, para 1493, *supra*. It seems to me that an action for conversion cannot lie in respect of money (see **Clerk & Lindsell on Torts,** 16th Edn., at para. 22-36) and "money' includes money standing to the credit of a person in a current account. See *Re Collings* [1933] Ch. 920. The respondent's claim is for conversion of the money in the current account of the respondent with the Bank which cannot succeed. In any event, the moneys, even if it can be said were converted, were used to pay the debts of the respondent and the appellant must be allowed the advantage of such payments. *See A.L. Underwood, Ltd. v. Bank of Liverpool and Martins* [1924] 1 KB 775, at p.794.

The alternative claim of "money had and received" was not argued at the lower Court nor in this Court, I therefore will not deal with it.

The appeal is therefore partially allowed. Instead of judgment for the respondent, the action of the respondent against the appellant is dismissed with 80 % costs, 80% only because of the failure of the appellant in his counter-claim, to be paid by the respondent to the appellant. The action based on conversion failed. The appeal against the decision of the learned Sessions Judge disallowing the appellant's counter-claim is dismissed.